

P R O C E E D I N G S

JULY 30, 2009

2:00 O'CLOCK P.M.

THE COURT: GOOD AFTERNOON.

MR. SABELLI: GOOD AFTERNOON.

THE CLERK: I'VE GOT TO SWEAR IN THE INTERPRETER.

THE COURT: FINE. SWEAR HER IN, BUT HAVE WE GOT EVERYBODY HERE WHO IS GOING TO BE HERE?

THE CLERK: YES.

THE COURT: WHERE'S MS. WAGNER?

MS. WAGNER: I'M HERE, YOUR HONOR.

HELLO, MS. WAGNER. ALL RIGHT. WHAT DEFENDANTS DO WE NEED FOR THIS?

MR. SABELLI: YOUR HONOR, MR. HERRERA, I THINK, IS THE ONLY PERSON.

THE COURT: ALL RIGHT. BRING HIM IN.

MR. SABELLI: YOUR HONOR, FOR THE INTERPRETER'S COMFORT I THINK THEY WOULD PREFER TO SIT WITH MR. HERRERA, IF THAT'S ACCEPTABLE TO THE COURT.

THE COURT: WE GOT TO SWEAR THEM, THOUGH.

MR. SABELLI: YES.

THE CLERK: OKAY. CALLING CRIMINAL NUMBER CR08-730, UNITED STATES VERSUS GUILLERMO HERRERA.

COUNSEL, PLEASE STATE YOUR APPEARANCES.

MS. WAGNER: RONNIE WAGNER FOR THE SAN FRANCISCO POLICE DEPARTMENT.

1 **THE COURT:** WELCOME.

2 **MR. SABELLI:** GOOD AFTERNOON, YOUR HONOR. MARTIN
3 SABELLI FOR MR. HERRERA, WHO IS NOT YET IN THE COURTROOM.

4 **INTERPRETER BASKER:** MELINDA BASKER, SPANISH
5 INTERPRETER. I HAVE BEEN SWORN IN THIS CASE.

6 AND?

7 **INTERPRETER MARTINEZ:** AND VICTOR MARTINEZ. I HAVE
8 NOT BEEN SWORN.

9 **THE COURT:** GO AHEAD, DAWN.

10 **THE CLERK:** OKAY, JUDGE.

11 (THEREUPON, INTERPRETER MARTINEZ WAS SWORN.)

12 **MR. SABELLI:** YOUR HONOR, MR. HERRERA IS NOW IN THE
13 COURTROOM.

14 **THE COURT:** MR. HERRERA, WELCOME BACK.

15 ALL RIGHT. WE'RE HERE ON A MOTION TO QUASH A
16 SUBPOENA. THE SUBPOENA WAS SERVED BY MR. SABELLI ON THE SAN
17 FRANCISCO POLICE DEPARTMENT. MS. RONNIE WAGNER IS HERE
18 REPRESENTING THE POLICE DEPARTMENT. SHE MADE A MOTION TO QUASH.

19 PARTIES MET AND CONFERRED AND SUPPLIED ME WITH THIS
20 RECENT REPORT, WHICH I JUST GOT A FEW MINUTES AGO, AND I'VE READ
21 MOST OF IT.

22 SO I GUESS WE JUST GET RIGHT INTO IT UNLESS THERE'S A
23 PRELIMINARY STATEMENT OF SOME SORT.

24 **MR. SABELLI:** I DON'T THINK THERE IS, YOUR HONOR,
25 EXCEPT TO SAY THAT MS. WAGNER AND I HAVE BEEN TRYING TO COOPERATE

1 AS MUCH AS POSSIBLE. THAT'S WHY IT WAS FILED LAST NIGHT RATHER
2 THAN EARLIER. IT'S A LENGTHY SUBPOENA. WE'VE TRIED TO GO
3 THROUGH EVERY ENTRY AND TRIED TO REACH AGREEMENT ON IT.

4 SO THAT IS THE STATE OF THE NEGOTIATIONS AT THIS
5 POINT, YOUR HONOR.

6 **THE COURT:** OKAY. ANYTHING YOU WOULD LIKE TO SAY,
7 MS. WAGNER?

8 **MS. WAGNER:** JUST THAT, YOUR HONOR, HAVING READ YOUR
9 EARLIER RULINGS IN CONNECTION WITH THIS CASE --

10 **INTERPRETER BASKER:** COULD THE INTERPRETER REQUEST
11 THAT THE COUNSEL SPEAK INTO THE MICROPHONE?

12 **THE COURT:** I GUESS YOU NEED TO SPEAK A LITTLE
13 LOUDER.

14 **INTERPRETER BASKER:** THANK YOU.

15 **MS. WAGNER:** IN LIGHT OF YOUR HONOR'S PREVIOUS
16 RULINGS IN CONNECTION WITH THIS MATTER, THE DEPARTMENT'S AWARE
17 AND AGREES THAT IT'S REASONABLE TO EXPECT A MORE NARROWLY-DRAWN
18 SUBPOENA WHERE SPECIFIC DOCUMENTS ARE REFERENCED RATHER THAN
19 ATTEMPTING TO ENLIST THE POLICE DEPARTMENT'S RESOURCES IN
20 CONDUCTING WHAT REALLY, WE BELIEVE, IS A FISHING EXPEDITION AND
21 WOULD BE UNWIELDILY AND ONEROUS FOR US.

22 SO IT'S TRUE THAT WE HAVE MET AND CONFERRED AT SOME
23 SIGNIFICANT LENGTH IN AN EFFORT TO AGREE ON CERTAIN ITEMS, BUT
24 IT WOULD REMAIN THE DEPARTMENT'S POSITION THAT ABSENT A COURT
25 ORDER IT'S NOT COMPLETELY TRUE THAT WE AGREE TO ANY PARTICULAR

1 PRODUCTION AT THIS JUNCTURE.

2 **THE COURT:** ALL RIGHT. I'M JUST GOING TO GO THROUGH
3 THESE ITEMS ONE AT A TIME. AND I'M LOOKING NOW AT THE SUBPOENA
4 ITSELF.

5 I ALSO HAVE IN FRONT OF ME, THOUGH, YOUR JOINT REPORT
6 SO THAT I CAN KIND OF CROSS-REFERENCE. ITEM NUMBER ONE:

7 "THE RECORDS OF ALLEGED CRIMINAL OFFENSES AND
8 GANG ACTIVITY INVOLVING DEFENDANT GUILLERMO HERRERA."

9 ALL RIGHT. LOOKS LIKE YOU'RE WILLING TO PRODUCE
10 THAT; IS THAT CORRECT, MS. WAGNER?

11 **MS. WAGNER:** YOUR HONOR, ASSUMING UNDER REDACTIONS
12 WOULD BE UNDERTAKEN AND WE WOULD STILL BE REQUESTING IN CAMERA
13 REVIEW IN CONNECTION WITH THOSE, AS WELL AS A PROTECTIVE ORDER.

14 **THE COURT:** WELL, WHAT IS THE PURPOSE OF ALL THAT?

15 **MS. WAGNER:** IT WAS SIMILAR TO THE OTHER MATTER WHERE
16 THERE WERE DISPUTES RELATIVE TO THE REDACTIONS, AND SO WE
17 WOULD -- I'M PREPARED TO IDENTIFY THOSE BY MEETING AND
18 CONFERRING WITH PERSONNEL FROM THE SAN FRANCISCO POLICE
19 DEPARTMENT GANG TASK FORCE AND BE ABLE TO SUPPLY THE COURT WITH
20 A FACTUAL PROFFER WHY THERE SHOULD BE SUCH A REDACTION, AND THEN
21 SUBMIT TO THE COURT'S RULING.

22 **THE COURT:** ALL RIGHT. ALL RIGHT. WHEN CAN YOU GIVE
23 ME THAT AS A DEADLINE?

24 **MS. WAGNER:** I'M SORRY. I DIDN'T HEAR THAT.

25 **THE COURT:** I NEED THE DATE. HOW ABOUT NEXT WEEK?

1 **MS. WAGNER:** YES, YOUR HONOR.

2 **THE COURT:** ALL RIGHT. END OF NEXT WEEK. FRIDAY THE
3 7TH.

4 OKAY. NUMBER TWO:

5 "RECORDS OF ALLEGED RICO ENTERPRISE MS13."

6 **MR. SABELLI:** AND, YOUR HONOR, I'M SORRY. ON THAT
7 FIRST POINT -- I'M SORRY TO INTERRUPT -- MS. WAGNER ASKED FOR A
8 PROTECTIVE ORDER. I WOULD JUST LIKE TO UNDERSTAND WHAT THAT IS,
9 WHAT MRS. WAGNER UNDERSTANDS IT TO BE AND WHAT THE COURT WOULD
10 UNDERSTAND IT TO BE.

11 **THE COURT:** WELL, I DON'T KNOW. HOW CAN I UNDERSTAND
12 WHAT IT IS UNTIL I SEE THE SENSITIVITY OF THE MATERIAL? BUT I
13 THINK WHAT YOU SHOULD DO IN YOUR SUBMISSION TO ME IS HAVE A
14 SEPARATE STATEMENT OR AFFIDAVIT SAYING:

15 "PLEASE PAY ATTENTION TO THE MATERIALS THAT ARE
16 TAGGED WITH A" -- YOU NAME IT -- "A BLUE TAG," AND
17 SAY:

18 "THESE ARE VERY SENSITIVE AND SHOULD NOT SEE THE
19 LIGHT OF DAY EXCEPT FOR COUNSEL'S EYES ONLY."

20 AND I'LL LOOK AT IT AND SEE IF I AGREE.

21 NOW, WITH RESPECT TO PROTECTING WITNESSES, I'M OKAY
22 WITH THAT. I THINK YOU SHOULD REDACT CIVILIAN WITNESSES TO ANY
23 CRIMES. I AGREE WITH THAT.

24 BUT YOU SHOULD GIVE ME A COPY OF WHAT IS NOT YET
25 REDACTED SO THAT I CAN COMPARE AND MAKE SURE. YOU KNOW, WHEN

1 THIS HAPPENED BEFORE THERE WERE ALL KINDS OF THINGS THAT WERE
2 REDACTED. THERE WERE BOGUS REDACTIONS. NOT BY YOU, BUT IN THE
3 OTHER CASE.

4 I WOULDN'T SAY "ALL KINDS," BUT, YOU KNOW, 15 PERCENT
5 OF THEM SHOULD NOT HAVE BEEN REDACTED.

6 SO I NEED -- AND YOU GOT TO GIVE ME TWO SETS SO THAT
7 I CAN SEE THE UNREDACTED AND THE REDACTED.

8 AND THEN, WE WILL COMPARE, IF I AGREE WITH YOU. BUT
9 THE GENERAL PRINCIPLE IS THIS IS A CIVILIAN WITNESS WHO SAID:

10 "YEAH, I SAW MR. HERRERA STAB THE GUY IN THE
11 BACK," AND WE'RE GOING TO PROTECT THAT GUY'S NAME.

12 **MR. SABELLI:** AND, YOUR HONOR, WOULD THE TERM
13 "CIVILIAN WITNESS" INCLUDE ALSO GANG MEMBERS OR RIVAL GANG
14 MEMBERS? LET'S SAY THERE'S A RIVAL GANG MEMBER WITH EVERY
15 REASON IN THE WORLD, ACCORDING TO THE SFPD TO WANT TO VISIT HARM
16 ON MR. HERRERA, AND THAT PERSON IS NOT A POLICE OFFICER, AND
17 THEREFORE A CIVILIAN BY DEFINITION, THAT PERSON INFORMS AGAINST
18 MR. HERRERA, IS THAT PERSON GOING TO BE --

19 **THE COURT:** ANYONE WHO IS INFORMING AGAINST MR.
20 HERRERA OUGHT TO BE REDACTED BECAUSE HE WOULD HAVE AN INCENTIVE
21 TO BUMP THEM OFF, ACCORDING TO THE PROSECUTOR. BUT I STILL WANT
22 TO SEE WHO IT IS. AND IF IT'S NOT IMMEDIATELY CLEAR, YOU GOT TO
23 EXPLAIN WHY IT SHOULD BE REDACTED. I'M NOT JUST GOING TO RUBBER
24 STAMP IT, ALL RIGHT?

25 WE GOT TO MOVE ON. I HAVE A HEARING IN 20 MINUTES.

1 ALL RIGHT?

2 "RECORDS OF ALLEGED RICO ENTERPRISE MS13, OR
3 ANY OF ITS AFFILIATES, SURENOS."

4 SURELY YOU MUST HAVE FILES THAT RELATE TO THESE
5 GANGS.

6 **MS. WAGNER:** YES, YOUR HONOR. AND AS I PROFFERED
7 BEFORE, BASED ON MY CONVERSATIONS WITH THE PERSONNEL FROM THE
8 GANG TASK FORCE, THEY ARE ORGANIZED AND CONTAINED WITHIN THAT
9 UNIT ACCORDING TO SUSPECT AND EVENT. THERE ISN'T ANY
10 CENTRALIZED --

11 **THE COURT:** HOW MANY WE GOT? HOW MANY WE GOT, 31
12 GANG MEMBERS HERE?

13 **MS. WAGNER:** RIGHT.

14 **THE COURT:** WHY DON'T YOU JUST TURN OVER ALL 31
15 FILES?

16 **MS. WAGNER:** WELL, IF THAT'S WHAT THE COURT ORDERS.

17 **THE COURT:** THAT'S REASONABLE. IT'S A LOT OF STUFF.
18 LOOK, THIS IS A HUGE CASE. NO MATTER HOW MUCH WORK YOU HAVE, I
19 PROMISE YOU I'M DOING TEN TIMES AS MUCH.

20 SO -- BUT THIS IS -- IF THAT'S THE WAY YOU ORGANIZE
21 IT, I THINK THAT'S A LEGITIMATE DISCOVERY TO SEE, SO TURN OVER
22 ALL THE FILES ON ALL GANG MEMBERS.

23 **MS. WAGNER:** SO JUST TO BE CLEAR, THAT WILL BE THE
24 DEPARTMENT WILL PRODUCE EACH OF THE 31 INDICTED DEFENDANTS'
25 ALPHA FILES WITH TWO SETS, ONE REDACTED ONE UNREDACTED, AND THE

1 AFFIDAVIT RELATING TO EACH REDACTION, OR PROPOSED REDACTION.

2 **THE COURT:** RIGHT.

3 **MS. WAGNER:** OKAY.

4 **THE COURT:** ALL RIGHT. NOW, IF YOU NEED MORE TIME
5 THAN NEXT WEEK TO GET THAT DONE, THEN, OKAY.

6 **MR. SABELLI:** YOUR HONOR, I WOULD SUGGEST THAT
7 THERE'S NO PRINCIPLE TO LIMIT IT TO THE 31 PEOPLE. THERE ARE
8 PLENTY OF FOLKS WHO ARE ALLEGEDLY MEMBERS OF MS13.

9 **THE COURT:** NO, WE'VE GOT TO LIMIT IT SOMEWHERE.
10 YOU'RE GOING TO TALK ME OUT OF THE 31, MR. SABELLI.

11 **MR. SABELLI:** NO. NO.

12 **THE COURT:** ALL RIGHT. STICK WITH THE 31.

13 NOW, LET ME BE JUST REAL CLEAR, THOUGH, MS. WAGNER.
14 I'M SURPRISED TO HEAR YOU SAY THAT THEY DON'T HAVE A SPECIAL
15 FILE CABINET THAT IS DEVOTED TO THE MS13. AND, IN OTHER WORDS,
16 IF I WAS IN THE POLICE DEPARTMENT, AND JUST BASED ON THAT OTHER
17 CASE, I HAVE SOME SUSPICION THAT THEY HAVE SOME WAY OF
18 ORGANIZING THE MATERIALS SO THAT THE MS13 PEOPLE ARE ALL KIND OF
19 SEGREGATED OUT.

20 YOU TELLING ME THERE'S NOTHING LIKE THAT?

21 **MS. WAGNER:** I'M TELLING YOU THAT'S WHAT SERGEANT
22 MCDONNELL INDICATED TO ME.

23 I'M SURE IT'S TRUE THAT EACH OF THE INSPECTORS WHO
24 CONDUCT THESE INVESTIGATIONS ARE WELL-CONVERSANT WITH GANG
25 AFFILIATION AS TO EACH SUBJECT, AND THEY SHARE THAT COMMON

1 KNOWLEDGE AMONGST THEMSELVES.

2 HOWEVER -- AND I'D BE HAPPY TO RETURN TO THE UNIT AND
3 DOUBLE-CHECK THAT ANSWER. BUT THAT IS AS I UNDERSTAND IT.

4 **THE COURT:** WELL, I THINK YOU SHOULD DOUBLE-CHECK
5 THAT.

6 AND IF IT TURNS OUT, MR. SABELLI, THAT YOU START
7 GENERATING INFORMATION THAT THEY HAVE AN ENTIRE FILE, OR FILE
8 CABINET OR SOMETHING DEVOTED TO MS13 WE WILL HAVE AN EVIDENTIARY
9 HEARING. WE WILL HAVE THE POLICE OFFICERS COME OVER HERE AND
10 TESTIFY UNDER OATH ABOUT HOW THEY ORGANIZE IT.

11 **MR. SABELLI:** AND, YOUR HONOR, THAT IS, IN FACT, THE
12 REQUEST I HAD MADE. TO BACK UP A STEP -- AND I KNOW THE COURT
13 IS CONCERNED ABOUT TIME. BUT THIS IS MAYBE THE MOST IMPORTANT
14 POINT ON THE ENTIRE SUBPOENA FOR US. IT'S MY EXPERIENCE HAVING
15 DONE MANY GANG CASES IN SAN FRANCISCO THAT THE GANG TASK FORCE
16 HAS KEPT GANG FILES.

17 NOW, I'VE NEVER AN MS13 FILE BECAUSE THIS IS MY FIRST
18 MAJOR MS13 CASE. BUT I KNOW THAT IN THE PAST I'VE SEEN WEST
19 MOB, BIG BLOCK FILES.

20 **THE COURT:** WELL, WE ARE -- MS. WAGNER, GO BACK. I'M
21 HIGHLY-SUSPICIOUS, SO I WANT YOU TO FIND OUT FOR SURE. AND WE
22 MAY HAVE AN EVIDENTIARY HEARING. WE WILL COME TO THE
23 EVIDENTIARY HEARING POSSIBILITY LATER. RECORDS RELATED TO
24 FLORES. WHO ARE THOSE PEOPLE?

25 **MR. SABELLI:** AND, YOUR HONOR, I WILL FOLLOW UP ON

1 THE SECOND REQUEST WITH A SHORT BRIEF EXPLAINING, JUST IN THE
2 INTEREST OF TIME, WHY IT IS THAT WE BELIEVE THAT THESE FILES
3 EXIST. AND WE'LL BE ASKING FOR AN EVIDENTIARY HEARING. I THINK
4 IT'S THAT IMPORTANT FOR US, YOUR HONOR.

5 **THE COURT:** ALL RIGHT. ALL RIGHT.

6 NUMBER THREE, THOUGH:

7 "RECORDS RELATING TO FLORES." WHO ARE THOSE
8 PEOPLE?

9 **MR. SABELLI:** YOUR HONOR, WE REDACTED THEM FROM OUR
10 JOINT STATEMENT. MR. FLORES -- AND I DON'T KNOW IF THE COURT
11 WANTS TO REDACT IT FROM THESE PROCEEDINGS. MR. FLORES IS MR.
12 ROSENBUSH'S CLIENT. HE IS A PERSON WHO THE UNITED STATES
13 BELIEVES MAY HAVE BEEN THE INTELLECTUAL ACTOR OF THE MURDER THAT
14 MY CLIENT IS ACCUSED OF.

15 **THE COURT:** ARE THESE GANG MEMBERS? ARE THEY
16 INDIVIDUAL --

17 **MR. SABELLI:** GANG MEMBER. HE'S A GANG MEMBER.

18 **THE COURT:** ALL THREE OF THESE ARE DEFENDANTS?

19 **MR. SABELLI:** NO. THE LAST PERSON IS AN INFORMANT
20 FOR THE UNITED STATES. HE'S A GANG MEMBER OR A FORMER GANG
21 MEMBER. I DON'T KNOW WHAT HIS CURRENT STATUS IS. BUT HE'S ONE
22 OF THE PEOPLE WE BELIEVE TO BE AN INFORMANT AGAINST MR. HERRERA.
23 AND OTHERS. AND SO MR. --

24 **INTERPRETER BASKER:** HE'S ONE OF THE PEOPLE THAT?

25 **MR. SABELLI:** WE BELIEVE IS AN INFORMANT AGAINST MR.

1 HERRERA.

2 **THE COURT:** WELL, I DON'T KNOW. THESE NAMES DON'T
3 EVEN MEAN ANYTHING TO ME.

4 WHAT'S YOUR OBJECTION TO PRODUCING THESE, OR DO YOU
5 HAVE ONE?

6 **MS. WAGNER:** WELL, YOUR HONOR, I THINK THAT AS TO
7 MORIS FLORES THAT ORDER OR ORDER FOR PRODUCTION WOULD ALREADY BE
8 SUBSUMED WITHIN YOUR PREVIOUS RULING AS TO NUMBER --

9 **THE COURT:** TWO?

10 **MS. WAGNER:** YES, YOUR HONOR. WHERE YOU'RE ASKING
11 FOR EACH OF THE 31. AND THEN, AS TO ROBERTO CLAROS ACOSTA,
12 ACCORDING TO GANG TASK FORCE I DON'T THINK THERE IS AN ALPHA
13 FILE. WE WOULD NEED TO RESEARCH INDIVIDUAL INCIDENTS.

14 **THE COURT:** ALL RIGHT. LOOK, PRODUCE THEM IF YOU'VE
15 GOT THEM.

16 **MS. WAGNER:** YES, YOUR HONOR.

17 **THE COURT:** END OF STORY.

18 NUMBER FOUR:

19 "PHONE RECORDS OF INDIVIDUALS WITH WHOM HERRERA
20 IS ALLEGED TO HAVE COMMUNICATED WITHIN 24 HOURS," ET
21 CETERA.

22 WELL, IF YOU GOT THOSE PHONE RECORDS YOU SHOULD
23 PRODUCE THEM.

24 **MS. WAGNER:** YES, YOUR HONOR.

25 **THE COURT:** IF YOU DON'T HAVE THEM, YOU DON'T HAVE TO

1 GO GET THEM.

2 **MS. WAGNER:** THAT WAS OUR POSITION, YOUR HONOR.

3 **THE COURT:** WELL, THEN THAT POSITION IS CORRECT. SO
4 YOU GOT TO PRODUCE THEM IF YOU HAVE THEM. OTHERWISE, YOU DON'T
5 HAVE TO GO GET THEM.

6 NUMBER FIVE:

7 "RECORDS OF ANY SEARCH BY SFPD RELATING TO THE
8 CAPITAL HOMICIDE."

9 WELL, I DON'T KNOW WHAT THAT MEANS. WHAT CAPITAL
10 HOMICIDE?

11 **MR. SABELLI:** THE CAPITAL HOMICIDE IS THE COUNT THAT
12 CHARGES THE CAPITAL CRIME AGAINST MR. HERRERA.

13 **THE COURT:** I'M GOING REQUIRE YOU TO DO THAT. BUT
14 THIS IS SUCH A POORLY-DRAWN REQUEST: "THE CAPITAL HOMICIDE,"
15 LIKE THE SFPD IS GOING TO KNOW WHAT YOU'RE TALKING ABOUT?

16 **MR. SABELLI:** WE'VE HAD DISCUSSIONS ABOUT IT, YOUR
17 HONOR, SO I MADE IT CLEAR WHAT THE DATE AND TIME IS.

18 **THE COURT:** YOU SHOULD PRODUCE THAT, MS. WAGNER.

19 **MS. WAGNER:** YOUR HONOR, JUST FOR THE RECORD, THAT IS
20 AN OPEN INVESTIGATION AND THE ASSIGNED INSPECTOR IS INSPECTOR
21 CAGNEY OF THE HOMICIDE DETAIL. SO THERE MIGHT BE SOME
22 DIFFICULTY WITH FULL PRODUCTION OF THAT AS FAR AS IT MIGHT
23 COMPROMISE A ONGOING LOCAL INVESTIGATION.

24 **THE COURT:** WELL, THEN YOU'LL HAVE TO SUBMIT
25 SOMETHING THAT SHOWS ME THAT'S TRUE.

1 **MR. SABELLI:** AND, YOUR HONOR, I WOULD SUGGEST THAT
2 THAT SHOULD BE PROPERLY LITIGATED. I'M NOT SURE THERE IS A
3 PRIVILEGE THAT IS APPLICABLE HERE. THAT'S THE FIRST I'VE HEARD
4 OF THAT, THAT PRIVILEGE BEING ASSERTED HERE.

5 IF IT IS, THEN I'M HAPPY TO ANSWER IT IN WRITING.

6 **THE COURT:** YOU'LL GET YOUR CHANCE. BUT LET'S SEE IF
7 THERE IS. IF YOU'RE GOING TO ASSERT SOMETHING WE'RE GOING TO
8 GIVE YOU SOME TIME LINES IN A MINUTE.

9 SIX:

10 "VIDEO OR PHOTO EVIDENCE COLLECTED BY SFPD
11 RELATING TO THE CAPITAL HOMICIDE."

12 WELL, OF COURSE YOU OUGHT TO TURN THAT OVER. WHY
13 WOULD THAT NOT BE -- SURELY THAT'S WHAT HE'S BEING TRIED FOR,
14 RIGHT? HERE THIS IS CAPITAL HOMICIDE.

15 SO YOU GOT TO TURN THAT OVER.

16 SIX -- SEVEN:

17 "ANY FORENSIC EVIDENCE COLLECTED BY SFPD
18 RELATING TO THE CASE."

19 WELL, OF COURSE, SAME THING.

20 NOW, HERE, THOUGH, LET'S SAY YOU GOT BULLETS,
21 CASINGS, YOU KNOW. I WANT TO GIVE YOU FIRST THE CHANCE TO DO
22 ALL THE FORENSICS YOU WANT WITH IT.

23 THEN, AFTER YOU'VE DONE YOUR FORENSICS THEN YOU WOULD
24 HAVE TO TURN IT OVER FOR THEIR EXPERT. YOU DON'T HAVE TO TURN
25 THIS OVER TO ME, THOUGH. YOU HOLD ON TO FORENSIC EVIDENCE.

1 YOU'RE TALKING ABOUT THINGS LIKE BLOOD SAMPLES AND BULLETS AND
2 ALL THAT?

3 **MR. SABELLI:** YES, YOUR HONOR.

4 **THE COURT:** WELL, OF COURSE HIS EXPERT OUGHT TO HAVE
5 A CHANCE TO LOOK AT THOSE, TOO, BUT YOUR EXPERT GOES FIRST.

6 **MS. WAGNER:** UNDERSTOOD, YOUR HONOR.

7 **THE COURT:** SO THIS ONE WILL BE ON A SLOWER TRACK
8 BECAUSE I'M SURE YOUR EXPERTS HAVEN'T FINISHED THEIR WORK YET.

9 **MR. SABELLI:** AND, YOUR HONOR, IT'S BEEN MY
10 EXPERIENCE IN THE HALL OF JUSTICE THAT FORENSIC ANALYSIS DONE BY
11 THE SF CRIME LAB CAN TAKE SIX TO EIGHT MONTHS. AND THAT WITH
12 THE SCHEDULE IN THIS CASE IT WOULD MAKE IT VERY DIFFICULT FOR US
13 TO DO OUR OWN FORENSIC ANALYSIS.

14 SO I'M GOING TO ASK THE COURT FOR SOME TIME LINES
15 WITH RESPECT TO THAT.

16 **THE COURT:** ALL RIGHT. WELL, THAT'S A GOOD POINT.
17 SO WE WILL GIVE YOU A DEADLINE SO YOU CAN GET YOURS DONE, TOO.

18 OKAY. DO YOU EVEN KNOW THIS? I'M JUST CURIOUS. DO
19 YOU HAVE BULLETS? DO YOU HAVE CASINGS? DO YOU HAVE BLOOD
20 SUSTAINS? WHAT HAVE YOU GOT THERE BY WAY OF FORENSIC EVIDENCE?

21 **MS. WAGNER:** YOUR HONOR, I REALLY DON'T HAVE ANY
22 KNOWLEDGE OF THE FORENSIC EVIDENCE. BUT I WILL SAY THAT I AM
23 PREPARED AND WILLING TO BE INSTRUMENTAL IN MEETING TIME LINES
24 WITH RESPECT TO OUR TESTING SO THAT IT CAN BE TURNED OVER FOR
25 SECONDARY EVALUATION.

1 **THE COURT:** "RECORDS" -- NUMBER EIGHT -- "RECORDS
2 RELATING TO HOMICIDES COMMITTED BY EQUALLY
3 CULPABLE" --

4 **MS. WAGNER:** THIS IS ONE TO WHICH THE COURT HAD --

5 **THE COURT:** THIS ONE -- I'M NOT GOING TO REQUIRE --
6 THIS IS BEYOND THE PALE, HAS LEGAL CONCLUSIONS TO "EQUALLY
7 CULPABLE."

8 NUMBER EIGHT IS NOT GOING TO BE ENFORCED, MR.
9 SABELLI. YOU SHOULDN'T WRITE SOMETHING THAT ARGUMENTATIVE.

10 **MR. SABELLI:** YOUR HONOR, I UNDERSTAND THE COURT'S
11 POSITION, AND I ACCEPT IT, OF COURSE. HOWEVER, THIS IS A VERY
12 BROADLY-WORDED INDICTMENT THAT LACKS SPECIFICS. AND IN A DEATH
13 PENALTY CASE WHERE ONE OF THE MITIGATING FACTORS IS WHETHER OR
14 NOT OUR CLIENT IS BEING SUBJECTED TO A CAPITAL ELIGIBLE
15 PROSECUTION EVEN THOUGH OTHERS WHO ARE MORE CULPABLE IN THE SAME
16 AREA, MORE CULPABLE IN THE SENSE OF COMMITTING WORSE CRIMES, ARE
17 NOT BEING CHARGED WITH THE DEATH PENALTY.

18 WE ARE OBLIGATED TO MAKE THAT REQUEST. I THINK IT'S
19 ONE THAT CAN BE WORKED OUT BETWEEN THE PARTIES, AND THAT'S WHY
20 I'VE INDICATED --

21 **THE COURT:** MAYBE YOU'LL HAVE TO DO A NEW REQUEST.
22 HERE'S SOMETHING I'VE LEARNED IN THIS JOB. IF IT'S IN THE
23 BALLPARK I'LL REFORM IT TO SOMETHING REASONABLE. THIS ONE IS
24 NOT EVEN IN THE BALLPARK. YOU HAVE TO DO IT ALL OVER AGAIN. I
25 AM NOT GOING TO FIX IT FOR YOU.

1 NUMBER NINE.

2 **MR. SABELLI:** I'LL GET BACK IN THE BALLPARK, THEN
3 YOUR HONOR.

4 **THE COURT:** WELL, GOOD.

5 "RECORDS RELATED TO GANG ACTIVITY OF HOMICIDE
6 VICTIM ARMANDO ESTRADA AND HIS BROTHER."

7 **MS. WAGNER:** THE DIFFICULTY, YOUR HONOR, ACCORDING TO
8 SERGEANT MCDONNELL IS IN THE FIRST INSTANCE THERE IS NO ALPHA
9 FILE ASSOCIATED WITH ARMANDO ESTRADA. AND, SECONDARILY, BASED
10 ON THE WORDING OF THIS REQUEST THE SERGEANT DOES NOT BELIEVE THE
11 PERSON TO WHOM IT REFERS AS THE BROTHER IS, IN FACT, HIS
12 BROTHER.

13 HE THINKS IT'S REFERENCING SOMEBODY ELSE. SO IT'S --
14 I THINK IT'S SIMILARLY UNINTELLIGIBLE AND --

15 **MR. SABELLI:** YOUR HONOR?

16 **THE COURT:** WELL, WHAT THEY ARE SAYING IS AS DRAWN
17 THERE IS NO EVIDENCE TO PRODUCE, SO YOU CAN'T MAKE THEM PRODUCE
18 SOMETHING THAT DON'T EXIST.

19 **MR. SABELLI:** WELL, THAT'S ALMOST WHAT I HEARD. WHAT
20 I HEARD MS. WAGNER SAY IS THERE'S NO ALPHA FILE. AND ONE OF THE
21 THINGS I TRIED TO LAY OUT IN OUR PRELUDE TO OUR MOTION IS WE
22 DON'T WANT TO FOCUS EXCLUSIVELY ON AN ALPHA FILE.

23 THE COURT MUST KNOW FROM ITS PREVIOUS HEARINGS IN
24 OTHER CASES SAN FRANCISCO TASK FORCE DOES KEEP INFORMATION IN
25 WAYS THAT MAY BE THE REST OF US WOULDN'T.

1 AND SO THERE MAY BE PLENTY OF INFORMATION ABOUT THE
2 ESTRADA BROTHERS. AND I DO BELIEVE THEY ARE BROTHERS. AND I
3 CAN MAKE A SHOWING WITH RESPECT TO THAT. THEY MAY HAVE
4 INFORMATION WITH RESPECT TO THESE TWO THAT IS NOT KEPT IN A
5 SO-CALLED "ALPHA FILE."

6 IT'S KEPT IN A DESK DRAWER OR A FILE LABELED
7 SOMETHING ELSE.

8 **THE COURT:** WELL, THAT'S POSSIBLE. BUT HERE'S THE
9 THING. I THINK THIS IS ONE THAT YOU HAVE TO TAKE UP AT AN
10 EVIDENTIARY HEARING AND HAVE THE GANG TASK FORCE PEOPLE TESTIFY
11 ABOUT THE WAY THEY KEEP THEIR RECORDS.

12 **MR. SABELLI:** I AGREE.

13 **THE COURT:** AND THAT WAY YOU CAN ZERO IN ON SOMETHING
14 THAT IS MANAGEABLE.

15 **MR. SABELLI:** I AGREE.

16 **THE COURT:** BUT THIS ONE:

17 "RECORDS RELATED TO THAT" IS SO BROAD AS WRITTEN
18 I'M NOT GOING TO ENFORCE IT.

19 NUMBER 10:

20 "AS TO DEFENDANT HERRERA THE FOLLOWING DOCUMENTS
21 MUST BE PRODUCED. NUMBER A: COPIES OF ALL SF GANG
22 TASK FORCE FILES RELATED TO THE ACTIVITIES OF THE
23 ORGANIZATION MS13 FROM JANUARY 1996 TO THE PRESENT
24 DATE."

25 WELL, I THINK THAT'S A PRETTY REASONABLE REQUEST

1 EXCEPTING FOR THAT DATE. WHERE DID THAT DATE COME FROM,
2 JANUARY 1996?

3 **MR. SABELLI:** THAT IS ALLEGEDLY WHEN MS13 BEGAN ITS
4 OPERATIONS IN SAN FRANCISCO.

5 **THE COURT:** WHAT IS THE EARLIEST DATE THAT ANY OF THE
6 DEFENDANTS ARE ALLEGED TO HAVE DONE ANYTHING IN THE INDICTMENT?

7 **MR. SABELLI:** IN THE INDICTMENT I BELIEVE IT'S 1996.

8 **THE COURT:** THEY SAY FROM 1996, THE INDICTMENT
9 CHARGES? THAT'S BEYOND THE STATUTE OF LIMITATIONS.

10 **MR. SABELLI:** BUT THE INDICTMENT CHARGES A RICO
11 ENTERPRISE THAT GOES BACK THAT FAR. WHETHER OR NOT ANY OF THE
12 OVERT ACTS FALL WITHIN THAT RANGE I AGREE THAT WOULD BE BEYOND.
13 ALTHOUGH IT IS A RICO INDICTMENT. AND SO THE ALLEGATIONS IN THE
14 INDICTMENT I BELIEVE GO BACK TO 1996 AS PART OF THE HISTORY OF
15 THE ORGANIZATION.

16 **THE COURT:** ALL RIGHT. THIS ONE I'M GOING TO MODIFY
17 AS FOLLOWS: YOU DON'T HAVE TO -- THE WORD "RELATED TO" IS SO
18 BROAD, BUT HERE'S WHAT IT'S GOING TO BE.

19 IF WE'RE GOING TO SAY "COPIES," ANY COPIES OF ANY
20 MEMOS THAT ARE DIRECTED TO SUMMARIZING THE HISTORY OF ACTIVITIES
21 OF THE MS GANG AT ANY POINT IN TIME, REALLY.

22 I JUST GOT TO BELIEVE THEY GOT SOMETHING THERE THAT
23 IS LIKE A -- YOU KNOW, A SHORT COURSE ON THE MS13. SO ANYTHING,
24 ANY MEMORANDUM THAT IS SPECIFICALLY DEVOTED TO THE ONGOING
25 CURRENT EVENTS OF MS13 OR THE HISTORY OF MS13 THAT IS KEPT

1 WITHIN THE FOUR CORNERS OF THE GANG TASK FORCE, YOU GOT TO
2 PRODUCE THAT.

3 **MR. SABELLI:** LET ME BE SPECIFIC ABOUT TWO TYPES OF
4 DOCUMENTS THAT I THINK EXIST, YOUR HONOR. ONE IS THAT I'VE SEEN
5 THE GANG VALIDATION MEMOS THAT ARE THE PRODUCT OF WORK BY THE
6 SFPD GANG TASK FORCE, WITH ASSISTANCE FROM THE DISTRICT
7 ATTORNEY. AND THEY ARE KEPT BY THE GANG TASK FORCE, AT LEAST
8 WITH RESPECT TO AFRICAN-AMERICAN GANGS.

9 I HAVEN'T SEEN ONE IN AN MS13 CONTEXT BECAUSE I
10 HAVEN'T LOOKED FOR ONE. THAT IS ONE TYPE OF DOCUMENT THAT I
11 WOULD SPECIFICALLY AS THE COURT TO DIRECT MS. WAGNER TO PRODUCE.

12 **MS. WAGNER:** SIR, I CAN SPEAK TO THAT. THERE IS NO
13 PARTICULAR VALIDATION MEMORANDUM THAT OCCURS ACCORDING TO THE
14 TASK FORCE. IT'S THE COURT THAT MAKES THE VALIDATION
15 CONCLUSION. HOWEVER, THERE IS A DOCUMENT SOMETIMES CONTAINED
16 WITHIN THE ALPHA FILE THAT IS A CHECK-THE-BOX FORM INDICATING
17 PARTICULAR FACTS THAT SUPPORT THE ASSERTION OF GANG AFFILIATION.

18 AND SO THAT WOULD BE NECESSARILY PRODUCED ALONG WITH
19 THE ALPHA FILE, AND THE COURT WILL FIND THAT AND REVIEW IT.

20 **MR. SABELLI:** WE'RE TALKING ABOUT TWO DIFFERENT
21 THINGS. THE GANG VALIDATION SHEET THAT SHE'S TALKING ABOUT
22 REFERS TO AN INDIVIDUAL. IT'S GOT 11 CRITERIA. AND THE LAST
23 ONE BEING "SELF-ADMISSION." THE FIRST ONE BEING -- THERE'S NO
24 NEED TO GO INTO THEM.

25 I'M NOT TALKING ABOUT VALIDATION OF AN INDIVIDUAL.

1 I'M TALKING ABOUT THE GANG TASK FORCE TOGETHER WITH THE DISTRICT
2 ATTORNEY VALIDATING THE EXISTENCE OF A GANG. AND IT'S CALLED "A
3 GANG VALIDATION MEMO."

4 AND I'VE SEEN THEM IN ANOTHER CONTEXT, IN THE
5 AFRICAN-AMERICAN GANG CONTEXT.

6 NOW, IF MS. WAGNER TALKS TO HER FOLKS, AND AT AN
7 EVIDENTIARY HEARING THEY COME IN HERE AND SAY:

8 "WE DON'T DO THOSE ANYMORE," THEN CERTAINLY
9 THAT'S SOMETHING THE COURT WILL DECIDE WHETHER OR NOT THAT'S
10 TRUE BASED UPON THE EVIDENCE PRESENTED.

11 BUT THOSE THINGS NEED TO BE INQUIRED ABOUT
12 SPECIFICALLY, BECAUSE THERE WOULD BE A MEMO ABOUT THE GANGS
13 ABOUT A SPECIFIC GANG PRODUCED BY THE GANG TASK FORCE.

14 THE SECOND SPECIFIC ITEM THAT I'M GOING TO ASK FOR,
15 YOUR HONOR, IS GRANT APPLICATIONS SUBMITTED BY THE GANG TASK
16 FORCE TO THE DEPARTMENT OF JUSTICE BASED UPON THE EXISTENCE OF
17 MS13 OR LATINO GANGS AND SETTING FORTH WHAT THEY BELIEVE TO BE
18 THE NATURE, HISTORY AND STRUCTURE OF LATINO GANGS, INCLUDING
19 MS13, AS A BASIS FOR GETTING FUNDING FROM THE UNITED STATES
20 GOVERNMENT, SPECIFICALLY THE DEPARTMENT OF JUSTICE.

21 AND I BELIEVE THOSE EXIST.

22 **THE COURT:** ALL RIGHT. I NEED TO STOP HERE FOR A
23 MINUTE. I'M SORRY THAT I HAVE RUN OUT OF TIME. I THOUGHT THIS
24 WAS GOING TO BE EASY. BUT I GOT A BETTER IDEA.

25 MR. GOODMAN, I STILL HAVE TO DEAL WITH YOUR CASE.

1 ALL RIGHT. I'M GOING TO ALLOW AN EVIDENTIARY HEARING.
2 YOU NEED TO FIGURE OUT -- I'LL LET YOU HAVE TWO WITNESSES OVER
3 THERE. SO YOU FIGURE OUT WHO YOU WANT, AND WE WILL HAVE AN
4 EVIDENTIARY HEARING DEVOTED TO THE LOCATION AND EXISTENCE OF
5 FILES AND DOCUMENTS.

6 **MR. SABELLI:** THAT MAKES SENSE, YOUR HONOR.

7 **THE COURT:** ALL RIGHT. I AM REMEMBERING SOME OF THIS
8 FROM THE OTHER CASE, BUT I DON'T REMEMBER ANYMORE. BUT THE WAY
9 TO GET AT THIS IS TO SEE WHAT THEY DO AND THEY DON'T HAVE,
10 INCLUDING NOT JUST THE OFFICIAL FILES BUT WHAT THEY KEEP IN
11 THEIR DESK DRAWERS, TOO.

12 SOMETIMES THAT'S MORE IMPORTANT. BUT YOU KNOW WHAT
13 I'M GOING TO DO ON THIS NOW, MS. WAGNER.

14 **MS. WAGNER:** YES, YOUR HONOR.

15 **THE COURT:** NOW WHAT I URGE YOU, AT LEAST YOU SEE
16 HOW I'M GOING TO RULE ON SOME OF THESE. YOU TWO MEET AND
17 CONFER. AND, PLEASE, I'M BEGGING YOU. I GOT SO MUCH WORK TO
18 DO. CAN YOU PLEASE TRY TO GET THIS MORE -- MORE AGREED UPON SO
19 THAT I DON'T HAVE AS MUCH TO DECIDE?

20 AND IF NOT, YOU KNOW I'LL EVENTUALLY GET AROUND TO
21 IT. BUT IT DOES SEEM TO ME THAT PROBABLY ABOUT HALF OF WHAT MR.
22 SABELLI WANTS IS YOU GOT TO PRODUCE IT.

23 **MS. WAGNER:** YES, YOUR HONOR.

24 **THE COURT:** MAYBE TWO-THIRDS. ALL RIGHT. I'M SORRY.
25 THAT'S AS FAR AS I CAN GET BECAUSE I'VE GOT THESE OTHER LAWYERS

1 HERE. BUT I HAVE TO DEAL WITH MR. GOODMAN. AND I MADE A NOTE
2 THAT WE HAVEN'T FINISHED THIS, BUT I'M ASKING YOU TO MEET AND
3 CONFER AGAIN. AND WE WILL SET A DATE FOR AN EVIDENTIARY
4 HEARING.

5 **MS. WAGNER:** SHALL THE DEPARTMENT BEGIN WITH
6 PRODUCTION OF --

7 **THE COURT:** I THINK GO AHEAD WITH WHAT YOU'RE WILLING
8 TO PRODUCE, ANYWAY.

9 **MS. WAGNER:** OKAY.

10 **THE COURT:** BECAUSE IT WILL BE A ROLLING TYPE THING.
11 AND I NEED TO LOOK AT THE CALENDAR. WE'RE GOING NEED ABOUT HALF
12 A DAY FOR AN EVIDENTIARY HEARING.

13 **MR. SABELLI:** YOUR HONOR, WE CAN CERTAINLY AGREE UPON
14 THAT. MS. WAGNER AND I CAN CONFER WITH MS. TOLAND AND TRY TO
15 FIGURE OUT A DATE, IF YOU PREFER. I KNOW THE COURT IS PRESSED
16 NOW. WE CAN CERTAINLY REACH MS. TOLAND AND TRY TO DO THAT.

17 **THE COURT:** I'M SORRY THAT I DIDN'T WHEN WE SET THE
18 CALENDAR UP. I THINK MY STAFF HAD NO CLUE THAT THESE WERE GOING
19 TO BE SO HARD TO -- WE REALLY -- YOU KNOW, THIS WOULD TAKE
20 ANOTHER HOUR TO GET THROUGH. AND --

21 **MR. SABELLI:** WE UNDERSTAND, YOUR HONOR.

22 **THE COURT:** THIS IS NOT YOUR PROBLEM WE JUST DIDN'T
23 DO A GOOD JOB ON CALENDARING TODAY.

24 **MR. SABELLI:** YOUR HONOR, WE WILL FOLLOW-UP WITH
25 MS. TOLAND. WE WILL SEE YOU ON THAT OCCASION.

1 **THE COURT:** THANK YOU. I KNOW WE HAVEN'T FINISHED,
2 BUT WE GOT HALF THE WAY THROUGH IT.

3 **MR. SABELLI:** YOUR HONOR, MAY I MAKE AN INQUIRY?
4 MOST OF THE DEFENDANTS IN THIS CASE OR THEIR LAWYERS ARE ASKING
5 WHERE WE ARE GOING TO HAVE THE EVIDENTIARY NEXT WEEK. IS TO
6 GOING TO BE HERE OR IN OAKLAND?

7 **THE COURT:** I BELIEVE -- DIDN'T WE SET IT UP THAT
8 EVERYBODY WOULD BE GIVEN A NOTICE?

9 **THE CLERK:** IT'S GOING TO BE HERE IN SAN FRANCISCO ON
10 THE 17TH FLOOR.

11 **MR. SABELLI:** OKAY. SAN FRANCISCO. THANK YOU, YOUR
12 HONOR.

13 **THE COURT:** 17? I THOUGHT IT WAS GOING TO BE IN THE
14 CEREMONIAL COURTROOM.

15 **THE CLERK:** WE'VE HAD TO MOVE TO THE SECURE
16 COURTROOM.

17 **THE COURT:** SECURE COURTROOM? THAT'S GOING TO BE
18 REAL TIGHT, THEN.

19 **MR. SABELLI:** I'LL LET EVERYONE KNOW, THEN.

20 **THE COURT:** I'M SORRY. IT'S GOING TO BE A BIT OF A
21 MESS, BUT WE'RE GOING TO DO IT OVER HERE.

22 (THEREUPON, THIS HEARING WAS CONCLUDED.)
23
24
25